# No. 15,335

# United States Court of Appeals

## For the Ninth Circuit

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THE CANADIAN INDEMNITY COMPANY, a corporation,

*Appellant,*

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, PRUDENTIAL ASSURANCE COMPANY LIMITED OF LONDON, and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32914-C,

*Appellees.*

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## APPELLANT'S PETITION FOR A REHEARING.

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## APPELLANT'S PETITION FOR A REHEARING.

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*To the Honorable William Denman, Walter L. Pope and Richard H. Chambers, Judges of the United States Court of Appeals:*

Appellant The Canadian Indemnity Company hereby petitions for a rehearing under Rule 23 of this Court upon the grounds enumerated herein.

I. THE OPINION OF THIS COURT, IN ITS DISCUSSION OF THE ALAMEDA ACTION, FAILS TO CONSIDER THE QUESTION OF PROXIMATE CAUSE.

Whenever a suit is filed for tortious negligence, it is basic that two things must be proved in order to secure a judgment against the alleged tort feasor:

(1) That the tort feasor was negligent toward the plaintiff; and

(2) That such negligence was a proximate cause of the accident or injury.

1 Witkin, Summary of California Law, p. 724, Negligence Par. 175.

If either of these two items be lacking, and if, nevertheless, liability is imposed, then such liability must be vicarious.

Land was held liable. No charge of vicarious liability was made against Land. Hence, both of these items must have been proved as against Land.

Correia was exonerated. This necessarily means that either (1) Correia was not negligent; or (2) even if Correia was negligent, his negligence was *not* a proximate cause of this accident.

It is submitted that there was no possibility of holding Correia vicariously liable—the pleadings contained no allegation of vicarious liability on the part of Correia.

Hence, appellant respectfully takes issue with the Court's statement at page 8 of its opinion: "If negligence had been attributed to Correia, it probably would have been *respondeat superior* negligence, be-

cause he was not at the store when the injury occurred and had no affirmative part in the sequence of placing the stumbling block in Mrs. Christensen's way." No *respondeat superior* negligence was alleged against Correia, and hence it could not have been found.

The opinion of this Court continues at page 8,

> "We suspect the jury may have thought Correia didn't have enough authority to keep adequate help on the job to keep temporary obstructions out of the aisles. It may have thought the safety instructions he had passed on to employees went only through him as a conduit from top management."

Appellant submits that no reason exists for this Court to assume that Correia testified untruthfully; a witness is presumed to speak the truth. He testified as follows at page 9 of his testimony, lines 9-15:

> "Q. Who would make the decision as to how many employees were warranted to run that store from seven to nine?
>
> A. I would.
>
> Q. In your judgment, when you left the store you felt, I take it, that one clerk and one courtesy boy could manage all the needs of the store for those two hours?
>
> A. That's right."

Since Correia, as store manager, made the decision concerning how many people would be on duty from seven to nine of that particular Friday evening, the following conclusion follows: Either (1), having so few employees on duty at that time was not negligent,

or (2), even if having so few employees there at that time was negligent, such negligence was not a proximate cause of the accident. The exoneration of Correia does not make sense on any other hypothesis. It is precisely because of his absence at the time of the accident that a verdict against him, had it been returned, would have to be based on his decision that one clerk and one courtesy boy were enough for those two hours on Friday night. The whole case against Correia was based upon that decision by him.

It is submitted that this case does not turn on the general personnel policies or the over-all company policies of the corporate defendant. This case turns on the leaving of a single box in an aisle shortly after seven o'clock, bearing in mind that the aisles were all clear shortly before seven, when Correia went home. The proximate cause of this accident must be related to that particular box.

Consider the matter of safety instructions. It appears at page 10 of Correia's testimony that he had instructed Land *not* to leave a box in the aisle below eye level, where customers might be damaged by it. It appears at page 6 of such testimony that Correia had been told that repeatedly by his own superior. The instructions were perfectly good. This accident occurred because the instructions were violated by Land. It is true, of course, that Land said his "primary duty" was the checking out of customers at the cash register, but there is no inconsistency between the "primary duty" and the safety instructions. With no violence at all to his "primary duty," he could have

followed the safety instruction in any one of several ways: He could have put the other five bottles on the shelf in fifteen seconds, he could have asked Donald Nolan to take the box back out to the storeroom, or he could have taken the box up front with him to the cash register. It was his very failure to follow the safety instruction which is co-extensive with his negligence in this case; and his negligence has been proved.

If adequate safety instructions were given, and if the lack of help was not a proximate cause, then the liability of the corporation must have been derivative. A *respondeat superior* allegation was made, R. 34, and a *respondeat superior* instruction was given, R. 25. Hence, it is submitted that at the very least appellant has made a *prima facie* case that the judgment against it in the Alameda action was based upon *respondeat superior,* and it has not been shown to have been based upon anything else.

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**II. THE QUESTION OF WHETHER APPELLEES MUST SATISFY THE JUDGMENT RENDERED AGAINST LAND IS A SIGNIFICANT POINT REGARDLESS OF RESPONDEAT SUPERIOR AND THIS COURT OUGHT TO PASS ON IT.**

Appellant sought by its complaint in declaratory relief to learn what carrier or carriers must satisfy the judgment rendered against the corporation and against its employees in the Alameda action. Even assuming joint negligence by independently liable tort feasors, the question has not been completely answered.

Both the District Court and this Court have held that all policies involved in this case insure Louis Stores, Inc. No one has ever contended that Canadian insured Land. The opinion of this Court intimates that appellees *are* obligated to pay the liability assessed against Land, but yet this Court does not specifically pass upon this question.

The holding of this Court, it is submitted, comes to this: If Virginia Christensen makes demand upon Louis Stores, Inc., that it pay the Alameda judgment, then Canadian and Ohio Farmers must respond in a ratio of ten to one.

But suppose Virginia Christensen, as is equally her right, makes demand upon Clifton Land that he pay the Alameda judgment. Must not Ohio Farmers and Prudential then respond to the limits of their respective coverage? This Court in its opinion intimates that the answer to that question is in the affirmative. At page 2 of the opinion, this Court says that Prudential was on the risk covering Land to the same extent as was Ohio. At page 3 of its opinion, this Court says that Land had some protection under the Ohio policy. It is admitted that Ohio defended Land under its policy. At page 9 of its opinion, this Court says: "Wouldn't a California court make Ohio and Prudential pay Mrs. Christensen even though Louis Stores, Inc., was indifferent about the whole matter?" Appellant believes that clearly a California court would, and that is true regardless of whether Louis Stores, Inc., was in or out of the state. There is no

contribution among joint tort feasors, and a judgment creditor may pursue whichever one she chooses; this point is made, with citation of authority, at page 22 of appellant's reply brief, second paragraph.

(It is interesting to note that the law of California concerning joint tort feasors has recently been changed and there now is a right of contribution, California Code of Civil Procedure 875-880. If this law had been in effect at the time the Alameda action arose, its meaning would be as follows: With respect to one-half of the judgment, Canadian would have to pay ten-elevenths and appellees one-eleventh; with respect to the other half of the judgment, appellees would have to pay it *in toto*. Thus, Canadian would have to pay five-elevenths of the total judgment and appellees six-elevenths of the total judgment. That law, however, applies only to causes of action accruing on and after the first of January, 1958.

With reference to this tort, which occurred in 1955, there is no right of contribution among joint tort feasors and the judgment creditor may proceed against whichever judgment debtor or insurance carriers she chooses. It is not incumbent upon her to select the larger or the wealthier judgment debtor. If the pre-1958 California law on joint tort feasors was a jungle, it was one in which these parties had to dwell.)

No Court will ever be in a better position than this Court is now to answer the question of whether appellees are obligated to discharge the liability assessed

against Land in the Alameda action. It is a significant question and it is part of the declaration sought. This Court should pass upon it.

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### III. THERE IS A PATENT INCONSISTENCY BETWEEN THE HOLDING OF THIS COURT AND THE JUDGMENT WHICH IT AFFIRMS.

The judgment of the District Court appears at R. 57-59. It contains five paragraphs. Paragraphs 1, 2 and 3 thereof are affirmed by the opinion of this Court.

Paragraph 4 of the District Court's judgment, however, at R. 58, is affirmed only in part by the opinion of this Court. Paragraph 4 of said District Court judgment says that Land was not an insured under any of the policies of insurance issued by plaintiff or by defendants and is not entitled to enforce the provisions of any said policies. This Court agrees, at page 2 of its opinion, that Canadian's policy has no employees' endorsement although the Ohio policy does have such an endorsement.

At page 9 of its opinion, however, this Court specifically declines to decide the point of whether or not Land was insured. Yet, this Court affirms the judgment of the District Court. Hence, it is submitted, a patent inconsistency exists between the judgment of this Court and the judgment below. This Court, if it declines to make a holding on appellees' responsibility with reference to the liability assessed against

Land, should, at the very least, vacate or modify, if not reverse, part of paragraph 4 of the judgment rendered below.

Dated, San Francisco, California,
February 3, 1958.

Respectfully submitted,
EDWARD A. FRIEND,
*Attorney for Appellant and Petitioner.*

## Certificate of Counsel

I hereby certify that in my judgment this petition for a rehearing is well founded and it is not interposed for delay.

Dated, San Francisco, California,
February 3, 1958.

Edward A. Friend,
*Attorney for Appellant and Petitioner.*